# THE SUSAN B. ANTHONY AMENDMENT. EFFECT OF ITS RATIFICATION ON THE RIGHTS OF THE STATES TO REGULATE AND CONTROL SUFFRAGE AND ELECTIONS.*

THE submission of the proposed women's suffrage amendment to the Federal Constitution has already provoked a storm of controversy and discussion as to the effect its ratification will have on the rights of the States to regulate and control suffrage and elections.

The advocates of the amendment contend that if ratified its only effect will be a prohibition on the States from abridging or denying the rights of a citizen of the United States to vote on account of sex, and that it will not take away from the State governments the power to fix the qualifications of voters, which has belonged to them from the beginning. They therefore insist that the fear that its operation will give to the negro women of the South the right to vote, regardless of qualifications, is wholly unfounded, but that on the contrary negro women will be barred from the electorate until they are able to meet the same qualification now required by the Alabama and other Southern State constitutions of negro male voters.

On the other hand, the opponents of the amendment earnestly contend that if it is ratified, it will vest in the Congress of the United States power to overthrow the suffrage restrictions now found in the State constitutions of the South, or authorize reduction of our representation in Congress and the Electoral College under the provisions of the 14th amendment. It is even claimed by some of the opponents of the amendment that it would have the effect of transferring to the Federal Government the complete power to control the suffrage and regulate the elections in the States.

The limits of this discussion will not permit a proper con-

*Address before the Alabama State Bar Association by the Hon. Emmet O'Neal on July 5, 1919.

sideration of whether the proposed amendment is wise or unwise,—whether it strips the South of political power, or whether it strikes a serious blow at self-government. Moreover, its moral or social effects are not pertinent to this discussion. We shall only undertake, therefore, to examine and ascertain from the provisions of the Federal Constitution and their construction by the Supreme Court of the United States the effect the proposed amendment will have on the power of the States to regulate and control the qualifications of voters and elections as provided by their separate constitutions, or whether the enforcement of the proposed amendment will transfer to the Federal Government control of elections.

In order to reach a correct conclusion on the questions involved, it will be necessary first to ascertain the powers of the States as to suffrage at the time of the formation of the Constitution, and to determine what changes, if any, were made by the Constitution and its amendments.

## THE POWER OF THE STATES PRIOR TO THE FOURTEENTH AND FIFTEENTH AMENDMENTS AS TO SUFFRAGE.

The exclusive right of the several States to fix the qualification of their voters was older than the Constitution. Even in Colonial times, the right to vote had been regulated by their several Assemblies and not by the British Parliament, and this right was not surrendered when the Federal Union was formed. The unabridged and exclusive power of the States at the formation of the Government to regulate and control the suffrage of its own citizens was never delegated to the Federal Government, but was retained as one of their most important reserved rights. The only question, therefore, is whether by the adoption of the 14th and 15th Amendments that essential attribute of sovereignty was either limited or surrendered. That question has been very clearly and emphatically answered by the Supreme Court of the United States in repeated decisions, declaring that "The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States." "The first has not been

granted or secured by the Constitution of the United States, but the last has been."

While the Supreme Court has repeatedly declared that neither the Fourteenth or Fifteenth Amendments conferred the right of suffrage upon any one, yet, as stated by Chief Justice White, in Guinn *v.* United States [1] "While in the true sense, therefore, the Fifteenth Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect * * *."

It will be observed that the Fifteenth Amendment does not in express terms confer on the negro the right to vote. It only commands the States not to deny or abridge the right to vote on account of race, color or previous condition of servitude. By the inherent power of the amendment, which was self-operative, it struck out the discriminating word "white" from every State constitution, and the word "white" disappearing, all male citizens, without discrimination on account of race, came under the grant of suffrage made by the States.

## The Purpose of the Two Amendments.

As repeatedly declared by the Supreme Court of the United States, and as shown by the debates in Congress during the period that its adoption was being considered, the main purpose of the Fourteenth Amendment was to establish the citizenship of free negroes, which had been denied by the Dred Scott decision, and to make all blacks born or naturalized in the United States citizens of the United States, and to secure to them all of the civil rights that the superior race enjoyed. It did not confer the right to vote, but on the contrary recognized the right of the States to deny the suffrage to the negro race on account of their race, or color, or previous condition of servitude. It provided, however, that Congress could penalize any State so denying to the newly emancipated race, the right to vote, by reducing its representation.

It is true that the Fourteenth Amendment provides that no State shall make or enforce any law which shall abridge the

[1] 238 U. S. 347, 362.

privileges or immunities of citizens of the United States, but the Supreme Court of the United States years ago declared that the right of suffrage is not one of the necessary privileges of a citizen of the United States.[2]

While, as has been shown, the Fourteenth Amendment recognized the power of the State to deny to the negro the right to vote on account of his race, the Fifteenth Amendment nullified that power by providing: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." The adoption then of the Fifteenth Amendment, withdrew from the States the right which the Fourteenth Amendment had recognized, to deny the right to vote to the negro race on account of race, or color, or previous condition of servitude. On the contrary, it prohibited in unequivocal terms any State, or the United States, from abridging or denying to any citizen of the United States, the right to vote on account of race or color, and by its inherent power made null and void any State constitution or law which contravened its command. After its passage no State any longer had the option to deny the right to the negro to vote on account of race and accept the penalty which the Fourteenth Amendment provided. The power of Congress to reduce representation as a punishment to the State that denied suffrage to the negro could no longer be exercised, for the simple reason that no State could deny the right to vote to the negro on account of his race —such denial, if attempted, being nullified by the express command of the Fifteenth Amendment. If, therefore, a State passed a law which denied or abridged the right of the negro to vote on account of race, such law would be void by the operation of the Fifteenth Amendment, and hence Congress could not punish a State by reducing its representation for passing a void law.

In the case of Giles *v.* Teasley,[3] the Supreme Court held that if the provisions of the State Constitution of Alabama were repugnant to the Fifteenth Amendment, they were void, and that

[2] Minor *v.* Happersett, 21 Wall. 162.
[3] 193 U. S. 146.

the Board of Registrars appointed thereunder had no existence and no power to act, and would not be liable for refusal to register a voter, and could not be compelled by a writ of mandamus to do so. So it would be difficult to understand how Congress could reduce the representation of a State which had merely undertaken to adopt constitution or laws discriminating against the negro on account of race which by the inherent power of the Fifteenth Amendment were null and void.

## The Fifteenth Amendment.

The general impression prevails among the people that the Fifteenth Amendment conferred on the negro the right to vote, but, as we have seen, Chief Justice White in the most recent adjudication on the subject, declared: [4]

> "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to them from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

As Chief Justice White points out with such unanswerable logic, we need not look beyond the amendment itself to prove that in a general sense it does not take away from the State governments the power over suffrage which has belonged to them from the beginning. The States could not deny a right which was not within their power to grant. As Chief Justice White says, the very command of the Amendment is itself a recognition of the possession of the power by the States to withhold or grant the suffrage as they might elect. As he further declares in the same opinion:

"But it is equally beyond the possibility of question, that the

[4] Guinn *v.* United States, *supra.*

> Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude."

The restriction, he says, is conincident with the power, and prevents its exercise in disregard of the command of the amendment. In other words, the amendment says, we admit you have the power, but hereafter we prohibit you from exercising it in disregard of our command.

And, continuing his discussion, Chief Justice White, speaking for the Court, says:

> "But while this is true, it is also true that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals, and to the extent that obedience to its command is necessary. Thus the authority over the suffrage which the States possess, and the limitation which the Amendment imposes are coördinate and one may not destroy the other without bringing about the destruction of both."

So the doctrine which the Supreme Court has repeatedly declared in previous decisions that the Fifteenth Amendment does not confer the right of suffrage upon any one, but only prevents the States, or the United States, giving preference in this particular to one citizen of the United States over another, on account of race, color or previous condition of servitude, is reaffirmed by this, the fullest and most authoritative recent adjudication on the subject. Hence it is now settled beyond the possibility of question, that the amendment in its general sense does not take away from the State governments the power over suffrage, and the full and complete power which the States possess over the subject is only limited to the extent that the right to vote shall not be abridged or denied on account of race, color or previous condition of servitude.

## THE SUSAN B. ANTHONY AMENDMENT.

The proposed amendment provides as follows: "Section 1. The right of citizens of the United States to vote shall not be

denied or abridged by the United States or by any State on account of sex. Section 2. Congress shall have power to enforce this article by appropriate legislation." It will thus be seen that the amendment uses the identical language found in the Fifteenth Amendment, merely substituting for the words "on account of race, color, or previous condition of servitude," the words "on account of sex." Add the words "on account of sex" after the last words of the 15th Amendment, and the two amendments could be considered as one.

Does the Anthony Amendment, if ratified, give to women the right of suffrage? The same question was asked as to the Fifteenth Amendment; and the same answer of the Supreme Court that it did not in its true sense give to the negroes the right of suffrage, would be the answer now, as to the Anthony Amendment. It must be remembered that at the time of the passage of the Fifteenth Amendment most of the State constitutions confined the right to vote to male white citizens. The Fifteenth Amendment did not, therefore, in express terms confer on the negro the right to vote. It simply commands the States, or the United States, not to deny to the negro the right to vote on account of race or color, just as the amendment under consideration commands the States or the United States not to deny the right to vote on account of sex. Neither of the two amendments in express words confers the right to vote, because the right to vote comes from the States and not the United States; but, as declared by the Supreme Court of the United States, its prohibition of its denial or abridgment on account of race or sex might measurably have that effect. As Chief Justice White, in Guinn *v.* United States,[5] declared:

> "While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would

[5] *Supra.*

be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out."

In *Ex parte* Yarbrough [6] and Neal *v.* Deleware,[7] it was held that where the State constitutions at the time of the adoption of the Fifteenth Amendment conferred the right of suffrage on all male white citizens, the effect of the amendment was to cause the word "white" to disappear, and therefore all male citizens without discrimination on account of race, color or previous condition of servitude, came under the generic grant of suffrage made by the States.

Applying the same reasoning to the proposed amendment, it could be said that at the time of its submission or adoption many of the State constitutions conferred the right of suffrage only on male citizens, but by its inherent power, if adopted, it will strike from every State constitution the discriminating word "male," and, therefore, all citizens of the United States will come under the generic grant of suffrage made by the States. As women are citizens of the United States and as the amendment, when adopted, will by its inherent power strike out the discriminating word "male" from every State constitution, and without further legislation by the States or by the Congress, every State constitution would grant the suffrage to all citizens of the United States. The qualifications for suffrage made by the several States would remain unaltered and unaffected to the same extent as if the Fourteenth and Fifteenth and Nineteenth Amendments had not been adopted, provided there was no abridgment or denial of the suffrage on account of race, color or previous condition of servitude, or on account of sex. It follows, therefore, that immediately upon the adoption of the Nineteenth Amendment the word "male" being stricken out of every State constitution, *ex proprio vigore* of the amendment, women would be entitled to vote subject to all of the qualifications provided by the constitutions and laws of the several States.

---

[6] 110 U. S. 651.
[7] 103 U. S. 370.

THE POWER OF CONGRESS TO ENFORCE THE AMENDMENT.

The same grant of power as to the enforcement of the amendment is given to Congress as provided in the Fifteenth Amendment. That power does not extend to fixing the qualifications of voters,— a power alone vested in the States and never delegated to the Federal Government. The whole control over suffrage, and the power to regulate its exercise would be still left with and retained by the several States, with the restriction that they must not deny or abridge it on account of race, or color, or previous condition of servitude, or sex.[8] To use the language of Chief Justice White in Guinn *v.* U. S.,[9] in reference to the Fifteenth Amendment, which unquestionably also would apply to the Nineteenth Amendment, if adopted: "The Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its commands is necessary."

POLL TAX.

Assuming then that if the Nineteenth Amendment is ratified that it does *ex proprio vigore* annul the discriminating word "male" now found in the Alabama and other State Constitutions, and substantially confers on women the right to vote subject to the same qualifications that apply to male citizens, an interesting question arises as to whether women must pay poll taxes before they can register and vote.

Section 178 of the Alabama State Constitution provides that in order to entitle a person to vote at any election by the people, that "he shall have paid on or before the 1st day of February next preceding the date of the election at which he offers to vote, all poll taxes due by him for the year 1901 and each subsequent year."

Section 2074 of the Alabama Code provides that a poll tax to be applied exclusively in aid of the public schools shall be

[8] See Pope *v.* Williams, 193 U. S. 621, 629.
[9] *Supra.*

collected from every male inhabitant in this state over the age of twenty-one and under the age of forty-five years.

Now, as far as male citizens are concerned, the payment of the poll tax by those within the prescribed ages for 1901, and for every subsequent year, on or before the 1st of February preceding an election, is a prerequisite for the right to vote. Does this section apply to women in event the Nineteenth Amendment is adopted? By its express provisions the liability for payment of a poll tax applies only to male inhabitants unless the Nineteenth Amendment, when adopted, would have the effect of removing from the statute the word "male." This unquestionably would be its effect so far as the provisions of the constitutions of the States are concerned, but it would not appear to modify or change or amend the statutes. This being true, in the event of the adoption of the amendment, both black and white women could vote without the payment of the poll tax. This would result in a discrimination to which the male citizens of the State would strenuously object, and would overthrow one of the most important restrictions on voting which the framers of the Constitution intended to secure. The payment of the poll tax so far in advance of the election and its cumulative provisions has resulted in restricting the exercise of the elective franchise by the negro citizen more than any other provision of the State constitutions. While the requirement does not discriminate against the negro on account of race, yet its practical operation does close to him the voting booth more effectually than any other provision of the State constitutions.

### Occupation a Prerequisite to the Right to Vote.

Another provision of the Alabama Constitution found in Section 181, which establishes the permanent plan for the qualification for suffrage, provides that a citizen seeking to vote "must have worked or been regularly engaged in some lawful employment, business or occupation, trade or calling, for the greater part of the twelve months next preceding the time they offer to register." It is assumed that women who have been engaged in housekeeping for the greater part of twelve months preceding their offer to register, in the event the Anthony

Amendment is adopted, would be qualified under this provision, as housekeeping would clearly seem to be an occupation or employment. But it would appear that those women who were not engaged in housekeeping, or some other business or employment, would be denied the right to register or vote in Alabama. Certainly those women whose chief or only occupation is chasing the elusive god of pleasure, in all the forms of amusement and recreation of modern society, the society belles and leaders of fashion, whose hands were not hardened by toil, would find the doors of suffrage closed, only to be opened when they abandon their lives of leisure or idleness and secure some occupation or employment.

THE POWER OF CONGRESS TO REGULATE ELECTIONS.

This power is vested in Congress by the provisions of the Constitution as follows:[10] "The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." It is evident, therefore, that unless Congress interferes, the regulations of the election may be made wholly by the State, but by the very terms of this section "Congress may at any time by law make or alter such regulations."

In construing this section of the Constitution, the Supreme Court of the United States has established the following propositions: (1) There is no declaration by the Constitution that the regulation of elections shall be made either wholly by the State legislatures or wholly by Congress, but until Congress interferes the State regulations control. (2) If Congress does interfere it may either make the regulations, or it may alter them. If it merely alters or modifies the regulations, and there is any repugnance between the State regulations and the alterations by Congress, the alterations made by Congress control,—its power over the subject being paramount. (3) And this power to make or alter regulations of the elections can be exer-

[10] Constitution of the United States, Art. I, § 4.

cised as and when Congress sees fit to exercise it. If there is any conflict between State regulations and regulations made by Congress, those made by Congress take precedence. (4) Congress can, in its discretion, alter or modify, add to or subtract from, the regulations of the elections made by the States. The regulations made by Congress would take the place of those made by the States, so far only as they may be contrary, or repugnant. If consistent with the State regulations, both would stand. There could be no clashing of jurisdiction, because the regulations made by Congress would be paramount, and if they conflict with State regulations, to the extent of the conflict they supersede the State regulations, which cease to be operative. (5) The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount, and such Federal officers and agents have the requisite authority to act without obstruction or interference from the officers of the State. Thus, although Congress has no power to prescribe the qualifications of electors, the right to vote for members of Congress and for United States Senators is fundamentally based upon the Constitution, and was not intended to be left within the exclusive control of the States. It is therefore evident that Congress has paramount and plenary power to make laws for the regulation of elections in the States for Senators and Representatives in Congress, that it can make laws to prevent fraud and violence at elections, and provide for the presence of officers and agents to carry its regulations into effect. It may, if it sees fit, assume the entire control and regulation of the election of Representatives and Senators. It could appoint places for holding the polls, the times of voting, and the officers for holding the elections. It could regulate the duties to be performed, the custody of the ballots, the mode of ascertaining the result, "and every other matter relating to the subject." It could provide for keeping the peace at such elections, by arresting and punishing those guilty of breaking it.

Officers or persons authorized by State laws to perform certain duties must disregard State laws when they come in con-

flict with the act of Congress. As the Supreme Court has said:[11] "When the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress." Congress can provide for the appointment of supervisors and deputy marshals, and such other officers as it may deem proper for the conduct of the election. In *Ex parte* Siebold,[12] the Supreme Court has even held that Congress had constitutional power to enact a law for punishing a State officer of elections for the violation of his duty under a State statute in reference to an election of a Representative or Senator in Congress. The action of Congress under the authority vested in it by the Constitution, would be the supreme law of the land.

It has been held that the power of Congress to interfere for the protection of voters at Federal elections existed before the adoption of the Fourteenth Amendment. But it has never been claimed that the power of Congress to regulate elections conferred on it authority to prescribe the qualification of voters. On the contrary, Section 2 of Article 1 of the Constitution expressly provides that the electors in each State who vote for Senators and Representatives, shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The Supreme Court of the United States has repeatedly declared that the Constitution of the United States itself has adopted as qualifications of electors for members of Congress those prescribed by the States for electors for the most numerous branch of the State legislature, and the same provision now applies as to the qualification for electors for members of the Senate. Hence, no one can successfully contend that the Congress of the United States has any power to interfere with the exclusive right of the State to prescribe the qualifications of its electors, so long as such qualifications do not discriminate against the exercise of the right of suffrage on account of race, color or previous condition of servitude, or on account of sex, in the event the Nineteenth Amendment is adopted.

---

[11] *Ex parte* Siebold, 100 U. S. 371.
[12] *Supra.*

No man can vote in the Federal elections unless he is entitled to vote in the State, says the Supreme Court in Pope *v.* Williams.[13] And Mr. Justice Peckham, speaking for the Court in that case, said that the right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the condition that the right to vote shall not be abridged or denied on account of race, is unassailable. Yet, while it is true that Congress could not fix the qualifications of voters under its authority to regulate elections, it could through its officers and agents exercise a supervisory power over the subject.

It is generally conceded that neither the Constitutions of Alabama, Mississippi, South Carolina, Virginia or other Southern States, discriminate between the races in the qualifications of voters. If there is any discrimination it is found in the exercise of the discretion vested in the registrars in granting or refusing registration. Under the Constitution of Alabama no person can vote at any election of the people who is not registered and qualified. When the registrars arbitrarily refuse the right of registration to those who possess the qualifications demanded by the laws of the State, what would prevent Congress from providing that its officers or agents could examine and ascertain whether any person offering to vote and who had been denied registration unjustly had the qualifications required by the laws of the State, and if found qualified, to allow the vote to be cast and counted? What would prevent Congress from providing its own registrars with authority to register at such times and places as it might determine, all voters who possess the qualifications demanded by the laws of the State? It would be contended that Congress was not exceeding its constitutional powers by undertaking to fix the qualifications of voters, but was only exercising its authority "to make or alter the regulation of elections made by the States," by providing that a person possessing the qualifications required by the laws of the State could vote, even though registration had been denied by the State authorities.

The pivotal question, therefore, is whether the laws of Ala-

[13] *Supra.*

bama on the subject of registration are or are not merely election regulations. Registration is nothing but a method of proof prescribed for ascertaining the electors who are qualified to cast votes. The registers are merely the list of such votes. If, therefore, registration is a mere regulation, there can be no question as to the power of Congress to alter the regulation, or to make entirely new regulations providing for the registration of those found qualified by the laws of the State by its own officers or agents, or by altering, changing, modifying or subtracting from, the regulations made by the State on the subject.

But even if it be conceded that the statutes of the State providing for the registration of voters do not constitute regulations of elections within the meaning of the Constitution, and that, therefore, Congress cannot make or alter them, let us inquire what power on the subject would be vested in Congress by the provisions of the Fifteenth Amendment, which Congress is commanded to enforce by appropriate legislation. It has been declared by the Supreme Court that the power of Congress to legislate at all upon the subject of voting at State elections, excluding from consideration the power conferred by Section 4 of Article 1 of the Constitution, rests upon the Fifteenth Amendment.[14]

Under the authority conferred by Section 2 of the Fifteenth Amendment, Congress has heretofore undertaken to permit those who are entitled to register under the State laws, and who have been wrongfully denied that right on account of race, to be allowed to vote; and has also undertaken to punish any State official who, in violation of the laws of the State, denied the right of registration. Under the 3rd Section of the Act of May 31, 1870,[15] whenever by or under the constitution of any State any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done shall, if it fail to be carried into execution by reason of the wrongful act or omission, as aforesaid, of the person or officer charged with the duty of receiving or permitting such performance or offer to

[14] United States *v.* Reese, 92 U. S. 214.
[15] 16 Stat. L. 140.

perform, the action thereon shall be deemed and held as a performance of such act; the person so offering and failing, as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act. The act further provides that any judge, inspector or other officer of election whose duty it is to receive, count or give effect to the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, etc., the vote of such citizen upon the presentation by him of his affidavit stating such offer, etc., shall for every such offense forfeit and pay the sum of $500.00, and be guilty of a misdemeanor and fined, etc.

Under the Constitution of Alabama the act of registration is a prerequisite to voting and hence, by the provision of the Act of May 31, 1870, if a citizen who is otherwise qualified is denied registration, his offer to register shall be held as a performance in law of such registration, and he shall thereupon be entitled to vote, and any judge, inspector or other officer of election who shall wrongfully refuse to receive and count such vote upon a presentation of the affidavit required, is subject to pay $500.00, and is also liable to criminal prosecution.

Was such a statute as that of May 31, 1870, appropriate legislation to enforce the provisions of the Fifteenth Amendment? In answering the question in the case of the United States *v.* Reese,[16] the Supreme Court of the United States, speaking through Chief Justice Waite, declared that while it could not be contended that the Fifteenth Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at a State election, yet when such wrongful refusal is because of race, color or previous condition of servitude, Congress can interfere and provide for its punishment. They accordingly held that the 3rd section of the law we have quoted could not be sustained, not because of a lack of authority on the part of Congress to enact it, but because it failed in express terms to limit the offense of the inspector of elections for which the punishment is provided to a wrongful

[16] *Supra.*

discrimination on account of race. Moreover, they held that that law was expressed in language which was too general, too uncertain, and too liable to deceive the common mind. We have quoted this statute at length, and the decision in regard to its constitutionality, because it seems to clearly establish the proposition that, whenever by the action of registrars in Alabama or other Southern States negroes who are otherwise qualified are arbitrarily denied the right to register, Congress has power under the 2nd section of the Fifteenth Amendment by a proper statute to make the offer to register equivalent to actual registration, if the negro so offering is otherwise qualified, and the denial of registration is on account of his race or color.

In *Ex parte* Yarbrough,[17] Justice Miller, delivering the opinof the Court, qualified the opinion of the Court in the case of Minor *v.* Happersett,[18] which declared that the Constitution of the United States does not confer the right of suffrage upon any one, by saying the Court did not intend to say that the right to vote for a member of Congress was not fundamentally based upon the Constitution which created the office of member of Congress; and declared it should be elective, and pointed to the manner of ascertaining who should be elected. The Fifteenth Amendment, he declared, by its limitation on the power of the States and the United States "clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States." He further declared that the right, with which the citizens of African descent were invested by the Fifteenth Amendment, of exemption from discrimination in the exercise of the elective franchise on account of race and color, was a new constitutional right, the protection of which was within the power of Congress. In the very able opinion he rendered, he further announced that the exercise of that right both in the election of members of Congress and in other elections, was guaranteed by the Constitution, and should be kept free and pure by Congressional enactment whenever that is necessary.

---

[17] *Supra.* [18] *Supra.*

It will be claimed that the fear on the part of the South that Congress will undertake by legislation to enforce the provisions of the Fifteenth, or Nineteenth Amendments, if the Nineteenth Amendment is adopted, in view of their refusal since the defeat of the Force Bill years ago to take further action, is without any serious basis. Yet no one can safely forecast what legislation the exigencies of party politics may provoke. It is not my purpose, however, to undertake to predict what action Congress may take, but rather, to show the falsity of the position of those who claim Congress is without authority under the Constitution to enact laws which will secure to negroes, both male and female, otherwise qualified, the right to register and vote. Nor will I undertake to point out in this discussion and in this forum the tremendous influence which the newly emancipated women of the United States would exercise in politics, or the power and influence they could bring to bear on Congress through the solidarity of the action of their national organization, if they should decide that the South is denying and abridging the right of colored women, who might otherwise be qualified, to vote on account of their race or sex. Yet no one can deny that both the Fifteenth and the proposed Nineteenth Amendments abridge one of the functions most essential to the existence of a State,—the right to determine for itself who shall constitute its electorate. It was even contended with some force that any invasion of that right was beyond the power of amendment conferred upon three-fourths of the States by the people in the adoption of the Constitution. But however that may be, the recent amendments to the Federal Constitution and the one now proposed would seem to inaugurate a new constitutional policy,—of the States cheerfully surrendering and transferring to the Federal Government a part of those important reserved rights which formerly were so jealously guarded and defended as essential to "an indestructible Union composed of indestructible States."

Do these recent amendments and the proposed amendments to the Federal Constitution forecast a well established policy on the part of the States to surrender and transfer to the Federal Government the larger part of those reserved rights upon which

their sovereignty rests, and to create at Washington a consolidated government, exercising the functions heretofore considered as local in character, and the preservation of which by the States has heretofore been considered as necessary to the perpetuity of our beautiful Federal system? Those who are advocating such a policy of consolidation should remember that there is one fact that stands out in bold relief in the governmental history of the world,—the fact that "Central power is not vitalizing," and that to strip the States of their power to regulate their own electorate and to manage their own local affairs, and to transfer them to the Federal Government, would be "a fatal blow to their economic and political growth, and would be but the forerunner of their slow decay and disintegration." The lessons of history teach us that those governments which have longest endured, and longest enjoyed the blessings of free institutions, are the governments which have most sacredly preserved the principles of local self-government, the most cherished possession of the English speaking races.

Even though it be conceded that the mass of women of the country by their splendid services during the recent war have demonstrated their capacity for the exercise of the suffrage, and that its possession would tend to elevate the tone of our political life and secure many needed reforms, yet these blessings and reforms could all be secured by the action of the individual States. No one can deny, however, that the adoption of the proposed amendment will but intensify the difficulties of the solution of the racial problem in the South, and threaten our future with perils which it would be folly for us to ignore.

If woman suffrage is authorized by the constitution of the State, the majority of the people can at any time strike out the provision by a process not more formidable than repealing a legislative enactment. Imbed such a provision in the Constitution of the United States and it will be practically impossible for the people of the United States to modify or repeal it. However mistaken the policy may be discovered by actual experience to be, it will, by the adoption of the amendment, be so riveted down in the Constitution as to be hereafter practically unchangeable.

With the adoption of the amendment the great mass of negro women in Alabama and the South would become a part of the electorate. All negro women over twenty-one years of age, who have been residents of the particular State for the prescribed period, who can read a section of the Constitution of the United States, and who have been engaged in some work or occupation for the greater part of the twelve months preceding their registration, or, who, if unable to read, possess real or personal property of the value prescribed by the constitution of the State, would be entitled to register and vote. The addition of this mass of negro women to the electorate, most of whom would be wholly lacking in the character and qualifications which alone fit a citizen for the art of self-government, would unquestionably menace the domination of the white race, and might restore those deplorable conditions from which we have happily escaped.

To escape the admitted evils which might follow, the advocates of the amendment claim that we can rely on our registrars' refusing to admit negro women to registration. But the registrars are commanded by the State constitutions to admit to registration those found to possess the qualifications prescribed, and they would be acting illegally and wrongfully in refusing registration to those who were qualified.

It therefore follows that the only defense suggested by the advocates of the amendment against the danger or evils which might result from the admission of these large masses of incompetent women voters is one based on an illegal and wrongful action on the part of our registrars. Can the people of Alabama or the South afford to rest their protection against this threatened flood of incompetent electors upon a defense builded on fraud and wrong-doing? Such a defense, if available, would only be temporary.

The Republican Party, as is well known, has claimed chief credit for the submission of the proposed amendment. Assuming the position of protectors for the newly emancipated women they would be swift to introduce and enact laws to enforce the new amendment, and prevent the denial of the right to register or vote on account of race or sex.

The Grandfather clause in the Alabama Constitution has long since expired by limitation, and it could not again be invoked to meet the situation, because it has been expressly denounced as unconstitutional by the Supreme Court of the United States. But it will be claimed that the Supreme Court of the United States, in Williams *v.* Mississippi,[19] sustained the Constitution of Mississippi, and as the Alabama Constitution contained a similar provision, that that court has in effect decided that neither constitution on its face discriminates between the races. But it is well to remember that in that decision the Supreme Court announced:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The Constitutions of Mississippi and Alabama cannot be successfuly attacked on the ground that either on its face discriminates between the white and negro races, or denies the equal protection of the laws secured by the Fourteenth Amendment. However, if in their administration it could be shown that they are applied and administered by public authority, by registrars or other public officials "with evil eye and unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their right," they could be successfully attacked for the denial of that equal justice, which is still within the prohibition of the Constitution.

But aside from the evils or blessings which might follow the adoption of the amendment, it cannot be denied that both the Fifteenth and Nineteenth Amendments abridge one of the functions most essential to the existence of the States, by denying the plenary power they formerly possessed to prescribe who shall vote, and to that extent lessen their sovereignty, and increase the power of the Federal Government at their expense.

[19] 170 U. S. 213.

It is utterly impossible that any State can be sovereign which does not entirely control its own laws with regard to suffrage. Nor does it make the slightest difference that this surrender of its powers is voluntary. As declared by the Supreme Court of the United States, each State is endowed with all of the functions essential to separate and independent existence; and there can be no independent State while the right of suffrage is controlled by an external power.

The wise men who framed the Constitution of the United States never undertook to interfere in the slightest degree with the exclusive right of the States to control their own suffrage and elections. Even Alexander Hamilton, who was a leader of the centralizing tendencies of his day, declared in the Federalist: "Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of State governments?" Should not both the Eighteenth and the proposed Nineteenth Amendments be condemned in the language of Hamilton as an unwarrantable tranposition of power, and as a premeditated engine for the destruction of State governments?

In determining whether the proposed amendment should be ratified or rejected the country should not be influenced by political considerations, or yield to the specious plea of a selfish expediency. It has been strenuously urged that the failure of the South to ratify would alienate the suffrage States and bar to us the hope of success in the next national election. Yet the sacrifice of principle, the overthrow of the nice balance between State and Federal power so wisely adjusted by the framers of the Constitution, and the serious evils which will follow the practical surrender by the States of the right to control their suffrage and elections would be rather a costly price to pay for political power. Whenever the States are willing to surrender and transfer to the Federal government their essential reserved rights in consideration of temporary political power and patronage, the power to amend the Constitution instead of being

a method of correcting admitted evils or securing necessary changes will become the most powerful instrument yet devised for the destruction of our dual system of government. The States have plenary power to grant to women the right of suffrage, and hence the amendment is unnecessary, and an amendment which is unnecessary is unwise, useless and harmful.

*Emmet O'Neal.*

BIRMINGHAM, ALA.